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IN THE

Supreme Court of the United States

October Term 1971

No. 71-1102

RENO ANTONIOLI AND ALBERT GIST, et al,
Petitioners,

v.

LEHIGH COAL AND NAVIGATION COMPANY AND LEHIGH AND NEW ENGLAND RAILROAD, LEHIGH AND NEW ENGLAND RAILWAY, THE CENTRAL RAILROAD COMPANY OF NEW JERSEY, *Respondents.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Petitioners pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit entered in the above entitled case on November 30, 1971.

OPINIONS BELOW

The opinion of the court of appeals (Appendix A, *infra* at 1a) is not yet reported. The opinion and order of the district court is unreported and is reproduced here in Appendix E, *infra* at 18a.

JURISDICTION

The judgment of the court of appeals was entered on November 30, 1971 (Appendix C, *infra* at 15a). The jurisdiction of this Court is invoked under 28 U.S.C. 1254.

QUESTIONS PRESENTED

1. In an action filed by two plaintiffs but brought as a "class action" upon behalf of others similarly situated, are members of the "class" denied due process when the district court enters final judgment on the complaint in favor of defendants without determining, as required by Rule 23 of the Federal Rules of Civil Procedure, whether the action is or is not a proper class action, without affording the "class" any notice of the pendency of the action and an opportunity to elect not to participate in, and be bound by, the action, and where the legal effect of the judgment is to extinguish the rights of the "class" under principles of res judicata.

2. Are members of a class in a class suit denied due process of law by a district court order of summary judgment in favor of defendants, entered two and one half years after the commencement of the action, in which the court rejects the untried factual allegations of the complaint as to the scope and composition of the class as "conjectural", while at the same time denying plaintiffs' pending motion to determine the class, with the result that persons who at all times deemed themselves to be members of the class and therefore refrained from commencing separate actions during the two and one half year period to their prejudice, are held to never have been members of the class.

3. Whether the court of appeals erred in applying the State of Pennsylvania's six year statute of limitations to bar claims arising under federal law for equitable relief in the nature of a mandatory injunction.

4. Where claimants are vested with a continuing statutory right to receive benefits over a four-year period, do their claims resulting from denials of those benefits arise, for purposes of applying a statute of limitations or laches, as of the very beginning of the four-year period, as the court of appeals held, or do the claims continue to arise as the defendant continues to withhold the benefits throughout the four-year period.

STATUTORY PROVISIONS INVOLVED

(1) Section 5(2)(f) of the Interstate Commerce Act, 49 USC §5(2)(f), 54 Stat. 898, 906-907.

(2) Title 12, Pennsylvania Statutes Annotated, Section 31.

These provisions are set forth in Appendix D, *infra*, at 17a.

STATEMENT OF THE CASE

On September 26, 1961, the Interstate Commerce Commission approved a consolidation pursuant to Section 5(2) of the Interstate Commerce Act, 49 USC §5(2), of respondent Lehigh and New England Railroad ("Railroad") and respondent Lehigh and New England Railway ("Railway"). Under the terms of the consolidation, Railroad, a wholly owned subsidiary of respondent Lehigh Coal and Navigation Company ("Coal Company") was permitted to abandon most of its lines and to sell its remaining 40 miles of track

to Railway, a wholly owned subsidiary of the respondent Central Railroad Company of New Jersey ("Central").

The ICC included in the order approving the merger, (in order to fulfill its statutory obligation under 49 USC §5(2)(f), to assure "a fair and equitable arrangement to protect the interests of all the railroad employees" affected within four years from the date of the consolidation), a requirement that respondent Railway comply with the "labor protection" conditions established in the *New Orleans Union Passenger Terminal Case*, 282 ICC 271 (1952).[1]

Petitioners Reno Antonioli and Albert Gist, former employees of Railroad, commenced an action in the district court on November 8, 1968. They alleged on behalf of themselves and a class of more than 548 other former employees of Railroad similarly situated, that respondents had conspired to deny the class the four-year job protection rights which they were entitled to under the ICC order. Specifically, petitioners alleged that beginning in 1958 respondents began to divert substantial traffic of Railroad to other railroad lines, some of which were owned by respondents in whole or in part, in order to reduce the earnings of Railroad and create the illusion of a loss of business; that respondents used this reduction in traffic to justify furloughing and dismissing numerous Railroad employees; that this ruse was expressly designed (1) to strengthen respondents' case for consolidation before the ICC and (2) to remove employees of Railroad from their employment in advance of the

[1] The *New Orleans* decision, in turn, incorporates the labor protection provisions previously approved by the ICC in the *Oklahoma Ry Co. Case*, 257 ICC 177 (1944).

consolidation so Railway would incur no obligation to them under the job protection provision of the ICC order. More than 300 employees of Railroad were removed from their employment as a result of this conspiracy.

Petitioners' complaint also alleged that other employees who were employed by Railroad on the date of consolidation were later removed from their employment under circumstances that denied them, in whole or in part, the benefits to which they were entitled under the job protection provision of the ICC order.

Petitioners' complaint also alleged that respondents owed petitioners a duty to submit the disputes to arbitration, but had refused to do so, and sought equitable relief in the form of a mandatory injunction requiring respondents to submit the issues raised by the complaint to binding arbitration as provided by the provisions of Section 8 of the *Oklahoma* case, *supra*, which provides:

> 8. In the event that any dispute or controversy arises with respect to the protection afforded by the foregoing Conditions Nos. 4, 5, 6, and 7, which cannot be settled by the carriers and the employee, or his authorized representatives, within 30 days after the controversy arises, it may be referred by either party, to an arbitration committee for consideration and determination, the formation of which committee, its duties, procedure, expenses, et cetera, shall be agreed upon by the carriers and the employee, or his duly authorized representatives.[2]

[2] The foregoing claims were asserted in Count I of a three-count complaint.

On October 27, 1969, the district court entered an order noting that ". . . the parties have never argued in detail whether this action can be maintained as a class action in conformity with the requirements of Rule 23 of the Federal Rules of Civil Procedure," and directing the parties to complete discovery within 60 days upon this issue.

By Opinion and Order dated December 30, 1970, the district court denied petitioners' pending motion to determine the class under Rule 23 and granted respondents' pending motions for summary judgment, holding that the claims were barred by limitations and by laches.

The district court interpreted petitioners' claims as seeking relief solely on behalf of employees of Railroad who had been removed from their employment prior to the September 26, 1961 consolidation date to avoid affording them job protection rights. Petitioners' allegation in the complaint that the class also included employees who were still employed by Railroad on the consolidation date, but who were later removed from their employment without being given the benefits to which they were entitled, (and whose claims for relief might therefore have arisen at a different date for purposes of limitations and laches) was held by the court to be "conjectural", and the Court granted petitioners 30 days within which to amend the complaint "to clarify the situation".

On January 11, 1971, petitioners moved the district court to reconsider its Order of December 30, 1970 granting respondents' motions for summary judgment. This motion was denied on January 15, 1971. On January 18, 1971, within the 30 day period granted for submitting an amended complaint, petitioners moved

the court for leave to depose four persons to develop facts needed to prepare an amended complaint. The court did not deny this motion until February 3, 1971, after the 30 day period had expired.

Thereafter, on February 25, 1971, petitioners filed an Amendment to Complaint specifically alleging that the original claim for relief "embraces members . . . who, after November, 1962, were either furloughed or separated with no severance pay or with severance pay contrary to the conditions for the 'protection of labor' laid down in the ICC approval order of September 26, 1961."

On March 2, 1971, the district court denied leave to file the Amendment to Complaint as not having been filed within 30 days and therefore being untimely.

The court of appeals affirmed the district court's decision that petitioners' claims for relief were barred by limitations and by laches. The court of appeals also affirmed the district court's orders excluding certain claimants from the scope of the complaint and denying petitioners leave to file an amended complaint.

REASONS FOR GRANTING THE WRIT

1. THE COURT OF APPEALS DENIED PETITIONERS DUE PROCESS BY ENTERING JUDGMENT FOR DEFENDANTS WITHOUT COMPLYING WITH RULE 23

On October 27, 1969, approximately one year after the filing of the complaint, the district court entered an order noting that a determination had not been made whether the suit should proceed as a class action and directing the parties to proceed with discovery upon this issue. Despite its awareness of this unresolved issue, and despite petitioners' pending motion

to determine the class, the district court thereafter granted respondents' motions for summary judgment and dismissed the complaint. This decision was plainly erroneous under Rule 23(c)(1) of the Federal Rules of Civil Procedure which provides, in pertinent part, "As soon as practicable after the commencement of an action brought as a class action, the court shall determine by order whether it is to be so maintained."

Because the district court failed to comply with Rule 23(c)(1), the members of the class petitioners Reno Antonioli and Albert Gist represented did not receive the notice of suit required by Rule 23(c)(2). Because they received no notice, they were denied an opportunity to either appear and advance their claims personally, or more importantly, to notify the court that they wished to be excluded from the class—so as not to be bound by any judgment entered in the action—as expressly permitted by Rule 23(c)(2).

The district court compounded its error by failing, in entering judgment for respondents, to comply with Rule 23(c)(3), which requires that every judgment terminating a class action must "describe those whom the court finds to be members of the class" and "describe those to whom the notice provided in subdivision (c)(2) was directed, and who have not requested exclusion, and whom the court finds to be members of the class."

The substantial prejudice to petitioners as a result of the district court's failure to comply with Rule 23, is manifest. More than 300 former railroad employees within the class, who received no notice of action, have had their rights extinguished by the ruling that all claims are barred by limitations and laches.

The district court's decision is more than a violation of a procedural rule; it constitutes a denial of proce-

dural due process of law. *Windsor* v. *McVeigh*, 93 US 274, 277-278 (1876), where the court held,

> "That there must be notice to a party of some kind, actual or constructive, to a valid judgment affecting his rights, is admitted. Until notice is given, the court has no jurisdiction in any case to proceed to judgment, whatever its authority may be, by the law of its organization, over the subject-matter. But notice is only for the purpose of affording the party an opportunity of being heard upon the claim or the charges made; it is a summons to him to appear and speak, if he has anything to say, why the judgment sought should not be rendered. A denial to a party, of the benefit of a notice would be in effect to deny that he is entitled to notice at all, and the sham and deceptive proceeding had better be omitted altogether.
>
> "*The law is, and always has been, that whenever notice or citation is required, the party cited has the right to appear and be heard; and when the latter is denied, the former is ineffectual for any purpose.*" [Emphasis supplied.]

The district court denied due process when it applied limitations and laches to bar the claims of class members who were never notified of the pendency of the suit.

2. THE COURT BELOW ERRED IN EXCLUDING—WITHOUT NOTICE OR HEARING—NUMEROUS CLAIMANTS FROM THE SCOPE OF THE CLASS ACTION COMPLAINT

The major allegations of the complaint concern claims of former employees of Railroad who had been furloughed or dismissed prior to the effective date of

the consolidation between Railroad and Railway. The complaint also alleged, however, that the class included employees of Railroad who were employed by Railroad on the consolidation date. The district court, without conducting any form of inquiry, entered summary judgment in favor of respondents on the entire complaint, rejecting as "conjectural" petitioners' factual allegation that the class included employees of Railroad who were employed on the consolidation date. As shown above, in making this determination the district court followed none of the procedures required by Rule 23.

The district court granted petitioners 30 days "to clarify the situation" by an amendment to the complaint, but denied petitioners' timely request that they be permitted to develop this area by discovery. The court did not deny this motion until February 3, 1971, by which time the 30 day period for amending the complaint had expired. When petitioners nevertheless sought to file an amended complaint on February 25, 1971, the Court denied leave, stating that the time to do so had expired and that petitioners had not sought to extend the time. But the timely motion for leave to take discovery was surely adequate notice that additional time would be required to prepare an amended complaint.

The court of appeals interpreted the district court's decision as holding, contrary to the verified and uncontroverted averments of the complaint, that the class action did not encompass claimants who were employees of Railroad on the consolidation date.

These decisions of the courts below deprive petitioners of substantial rights in violation of Rule 23

and without affording petitioners notice or a fair opportunity to present their claims.

As a direct consequence of the rulings below, a class of at least 200 Railroad employees—who had thought since November 8, 1968 that their claims were being litigated before the district court—find that their claims have not been asserted in any judicial forum. If the rulings of the court below are permitted to stand, these claimants will have been delayed two and one half years in presenting their claims to their prejudice. Petitioners urge that the rulings are erroneous and arbitrary, and contrary to the teachings of *Conley* v. *Gibson*, 355 US 41 (1957).

The district court could not properly deny petitioners' motion to determine the class, ignore the requirements of Rule 23, and then read over 200 claimants out of the complaint without notice or hearing to those claimants, and in the face of verified allegations in the complaint to the contrary.

3. THE COURT OF APPEALS ERRED IN APPLYING A STATE STATUTE OF LIMITATIONS TO BAR PETITIONERS' CLAIMS FOR EQUITABLE RELIEF

The court of appeals correctly held that Section 5(2)(f) of the Interstate Commerce Act, 49 USC §5(2)(f), creates a right in affected railroad employees "... to protection from changes in employment status resulting from ..." a consolidation of railroads for a period of four years from the date of consolidation (App.A,p.6a),[3] and that the Act creates no period of limitations within which claims arising from in-

[3] See *Norfolk and Western Railway Company* v. *Nemitz*, 404 U.S. 37 (1971).

fringement of these rights must be asserted. The court of appeals erred, however, in concluding that the State of Pennsylvania's six year statute of limitations should be applied to bar petitioners' claims instead of fashioning a uniform federal rule for suits arising under Section 5(2)(f).

(a) It is unquestionably appropriate to look to state statutes of limitations where no federal provision governs and the action essentially seeks relief at law, *i.e.*, damages for breach of contract. *International Union* v. *Hoosier Cardinal Corporation*, 383 US 696, 704 (1966). It is inappropriate, however, to apply state statutes of limitations where the action seeks relief in equity. *Holmberg* v. *Armbrecht*, 327 US 392 (1946). See *Industrial Union* v. *Hoosier Cardinal Corporation*, *supra*, note 7.

Petitioners sought relief in equity in the nature of a mandatory injunction directing respondent Railway to submit the controversy to arbitration under the terms of paragraph 8 of the *Oklahoma* case.[4] It was plain error for the court of appeals, therefore, to apply the Pennsylvania statute of limitations to bar petitioners' claims for relief.

(b) In applying the state six-year statute of limitations the court of appeals failed to follow *Order of Railroad Telegraphers* v. *Railway Express Agency*, 321 US 342 (1943), where the Court held that it was error to apply Georgia's six-year statute of limitations to bar a suit to enforce an award of the National Railroad Adjustment Board directing payment of compen-

[4] There was, of course, no finding below that the complaint was in any way legally insufficient or beyond the jurisdiction of the district court.

sation to railroad employees. The Court held (pp. 347-348):

> "The Circuit Court of Appeals held the claims barred by the state six-year statute of limitations applicable in the forum. It is true that the enforcement of the award results in entering judgment in 1942 on claims that began to accrue in 1930 and some of which ceased to accrue over six years before the suit in the District Court was commenced. It also is true that some of these have accrued in large amounts.
>
> "If the action brought in 1939 had been a common-law action to recover wages, like that in *Moore* v. *Illinois C. R. Co.*, 312 U.S. 630, 85 L.Ed 1089, 61 S.Ct 754, a quite different question of limitations would be presented. The action as brought, however, was not a common-law action but one of statutory origin to enforce the award of an administrative tribunal. A special two-year limitation from the time of award was prescribed by the federal statute, and this action was brought within that period. It is clear that as an action to enforce the award the suit was not barred, and it must therefore have been the opinion of the Circuit Court of Appeals that the statute barred the administrative tribunal from making an award on claims so old. There is no federal statute of limitations applicable to unadjusted claims which the Adjustment Board may consider. It is difficult to see how state statutes of limitations can restrict the power of the federal administrative tribunal to consider and adjust claims."

Petitioners' action below is closely analogous to this

decision. Petitioners' suit "was not a common-law action but one of statutory origin" arising from Section 5(2)(f) of the Interstate Commerce Act and paragraph 8 of the *Oklahoma* case. Just as the railroad employees in the *Order of Railway Telegraphers* case were seeking to enforce an award of compensation by the National Railroad Adjustment Board, petitioners here seek to enforce via an ICC adopted arbitration procedure rights awarded and vested in them by the ICC as an integral part of the order approving the consolidation. Petitioners' action sought only to invoke the equity jurisdiction of the district court to compel access to an available remedy of arbitration under the ICC order. The decision of the court of appeals to apply Pennsylvania's statute of limitations operates "to restrict the power of the federal administrative tribunal to consider and adjust claims." (*Order of Railway Telegraphers*, supra, p. 348.)

(c) Assuming it was at all appropriate or necessary for the court of appeals to consider whether petitioners' claims were barred by limitations, the court should have fashioned a uniform federal rule rather than applying the Pennsylvania six-year statute of limitations. See *International Union* v. *Hoosier Cardinal Corporation*, 383 US 696 (1966). Not being an action at law for breach of a contractual obligation, which "resembles an action for breach of contract cognizable at common law" to be appropriately governed by state periods of limitations (*Ibid.*, p. 705, note 7), the claims arising from a federal statute should be controlled by a federal rule to assure uniformity of application throughout the 50 states. Without such a uniform rule, particularly in a suit brought as a class action by claimants residing in numerous states, whether par-

ticular claimants are barred from asserting claims arising from the same breach of the same obligation by the same defendant will depend upon the entirely different State statutes of limitations.

4. THE COURT OF APPEALS ERRED IN RULING THAT THE STATUTE OF LIMITATIONS COMMENCED TO RUN ON THE DATE OF THE CONSOLIDATION OF RAILROAD AND RAILWAY

Even assuming that the court of appeals properly applied the State of Pennsylvania's six-year statute of limitations, the court of appeals erred in deciding that petitioners' claims "accrued", and the statute commenced to run, on September 26, 1961, when consolidation was authorized.

Petitioners' were entitled to job protection benefits under the ICC order for a period of four years, or until September 26, 1965. Since the obligation of Railway to afford petitioners job protection ran throughout the entire four-year period, petitioners' right was "continuous" throughout the period and did not "accrue" for limitation purposes or laches until September 26, 1965.

Before a claim has "accrued" it must be "complete". *Rawlings* v. *Ray*, 312 US 96 (1941); *Cope* v. *Anderson*, 331 US 461 (1947); *Moviecolor, Ltd.* v. *Eastman Kodak Co.*, (C.A. 2, 1961), 288 F2d 80. In the context of this petition, the rule is aptly stated in the case of *State* v. *Johnson*, 216 Minn. 427, 13 NW2d 26 (1944), where the court stated

> "The rule that the statute of limitations does not run until the liability has ceased to continue rests upon the principle that where the obligation

> is continuing in nature the breach of violation or duty continues so long as the obligation continues, and that the cause of action or penalty as the case may be, must be deemed to be continually accruing during the entire time the obligation and the breach thereof continue."

Section 5(2)(f) of the Interstate Commerce Act was enacted by Congress specifically to provide continuous job protection to railroad employees affected by consolidation for a period of four years. The nature of this right forecloses any suggestion that petitioners' entire claims arose on September 26, 1961. Petitioners were entitled to commence their actions (even under Pennsylvania's six-year statute) any time within six-years from September 26, 1965. Having filed their claims on November 8, 1968, petitioners were well within the statutory time.

The court of appeals also based its decision upon the doctrine of laches. Since, however, the court of appeals plainly based its decision as to laches entirely upon its finding that petitioners were barred by limitations, see, *e.g.*, *Holmberg* v. *Armbrecht*, 327 US 393, 396 (1946), its decision in this regard was also erroneous.

This Petition presents for decision whether the job protection rights Congress has afforded to railroad employees affected by railroad consolidations is a "continuing" right which continues to accrue throughout the four-year period, or whether any claims arising from breaches of these rights vest entirely upon the first breach of the obligation following the consolidation date. Petitioners submit that this is an important question worthy of review by this Court.

CONCLUSION

For these reasons, a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

Nos. 71-1257 and 71-1258

RENO ANTONIOLI and ALBERT GIST, individually
and on behalf of others adversely affected
and
THE SOUTH JERSEY TEXAS EMPLOYEES ASSOCIATION

v.

LEHIGH COAL AND NAVIGATION COMPANY
and LEHIGH & NEW ENGLAND RAILROAD,
LEHIGH & NEW ENGLAND RAILWAY,
THE CENTRAL RAILROAD COMPANY
OF NEW JERSEY

RENO ANTONIOLI and ALBERT GIST, individually
and on behalf of others adversely affected,
Appellants in No. 71-1257

THE SOUTH JERSEY TEXAS EMPLOYEES ASSOCIATION,
Appellant in No. 71-1258

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Argued September 24, 1971
Before VAN DUSEN, ALDISERT and GIBBONS,
Circuit Judges

OPINION OF THE COURT

(Filed November 30, 1971)

VAN DUSEN, *Circuit Judge.*

This case is before the court on appeal from a district court order of December 30, 1970, granting summary judgment for defendants on Counts I and II of the complaint and dismissing Count III, without prejudice, for lack of standing to sue, after both plaintiffs and defendants had filed motions for summary judgment.

On September 26, 1961, the Interstate Commerce Commission, pursuant to 49 U.S.C. §5(2), approved the abandonment of all but 40 miles of the track of the Lehigh and New England Railroad (Railroad) and the sale of the remaining 40 miles to the Lehigh and New England Railway (Railway).[1] In order to meet its statutory duty under 49 U.S.C. §5(2)(f) to "require a fair and equitable arrangement to protect the interests of all the railroad employees affected," the ICC prescribed the labor protection conditions set out in *New Orleans Union Passenger Terminal*, 282 I.C.C. 271 (1952).[2] This appeal is from a district

[1] The ICC order of September 26, 1961, became effective on October 31, 1961.

[2] The basis for the *New Orleans* decision is the Washington Job Protection Agreement, which was a collective bargaining agreement entered into by most major railroads and unions in 1936 to prescribe standards of protection for employees affected by consolidation. The *New Orleans* decision includes the provisions of the *Oklahoma Ry. Co. Trustee Abandonment*, 257 I.C.C. 177 (1944), which was designed to supplement the earlier Washington Agreement.

court order denying the claims of former employees of Railroad to allowances for furloughs and dismissals resulting from the abandonment and merger based on alleged noncompliance with the ICC protective order.

The complaint is set out in three counts and seeks a mandatory injunction to compel arbitration of the disputes.[3]

Count I

Plaintiffs in Count I seek compulsory arbitration of their claims for displacement and severance benefits under the ICC protective order. The district court opinion of December 30, 1970, granting summary judgment on Count I, held that plaintiffs in Count I consisted of the workers of Railroad who were furloughed prior to the effective date of the consolidation. These furloughs allegedly occurred as the result of a plan to divert the traffic of Railroad in order to give the impression that Railroad was losing business as a result of general economic conditions, rather than as a result of the impending consolidation. On this appeal, plaintiffs have maintained that the closing date for determining membership in Count I is the effective date of the merger. They contend that Count I includes all those employees who were on the payroll of Railroad at the time of the merger and received less than the full benefits mandated by the ICC protective

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[3] Counts I and II seek arbitration under paragraph 8 of the *Oklahoma* case. Count III was added as an amendment to the original complaint and seeks the convocation of a special Board of Adjustment under §153 of the Railway Labor Act, 45 U.S.C.A. §153 (as amended June 20, 1966, P. L. 89-456), appearing in 1971 cumulative pocket part.

order.[4] An analysis of the record which was before the district court at the time it ruled on the summary judgment motions indicates that the closing date for determining membership in Count I was January 1959,[5] and that the composition of Count I was narrowed to include only those employees on the January 1959 payroll who were furloughed prior to the effective date of the merger. Plaintiffs' sole theory of relief for Count I is that employees were furloughed in anticipation of and prior to the consolidation.[6] In the

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[4] Counsel for plaintiffs, in a letter of October 5, 1971, to this court stated:

"Count I consists of 528 people on the payroll of the carrier at the time of the merger. . . ."

Similar assertions were made by such counsel at oral argument.

[5] Plaintiffs' complaint included a broad averment of the composition of Count I as including all the employees of Railroad who were listed on the January 1952 payroll. Paragraphs 1, 14 (23a, 26a). In response to defendants' interrogatories seeking clarification of the composition of Count I, plaintiffs changed the date for determining membership in the class so that it included only those employees whose names appeared on Railroad's January 1959 payroll. These answers also excluded the 22 members of Count II and the 30 members of Count III.

[6] Paragraph 12 of the complaint alleges that beginning in the spring of 1958 defendants began to divert traffic to other lines, thus reducing volume and causing the furloughing of many employees. Paragraph 15 then alleges that:

> "Specifically the workers in this Count complain that they lost their employment, not because of normal attrition—normal loss of business—but because of a scheme by 'Central' and 'Coal Company' to create the appearance of loss of business. . . ."

The absence of any additional theories of recovery from the record thus further limits the plaintiffs' class to those employees on the January 1959 payroll who were furloughed

district court order of December 30, 1970, leave was granted to amend the complaint within 30 days to clarify the class of plaintiffs in Count I. Plaintiffs failed to file a timely amendment to the complaint.[7]

The district court found that as a matter of law all of plaintiffs' claims in Count I were barred by the statute of limitations and the doctrine of laches in view of the six-year limitation period established by Pennsylvania law.[8] The alleged wrongs in this Count, the furloughing of employees in anticipation of the consolidation, all must have occurred prior to the effective date of the consolidation, November 1, 1961. The

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Note 6—*Continued*

due to the alleged diversion of traffic. Plaintiffs relied on a definition of the Count I class as including only employees furloughed in anticipation of the November 1, 1961, merger in their "Brief in Support of Summary Judgment Ordering the Parties to Arbitrate the Dispute," as follows (see p. 10):

> "The dispute in [Count] I . . . [is] simply that some workers were furloughed in anticipation of the transaction approved by the ICC and hence deprived of displacement compensation, (Count I). . . ."

[7] Plaintiffs filed an amended complaint on February 25, 1971. Viewing the time limitations for the filing of such amendment in the light most favorable to the plaintiffs, their amendment to Count I was properly denied as being untimely by Judge Fullam's order of March 2, 1971. Even assuming that the 30-day period did not begin to run until the denial of plaintiffs' motion for reargument of January 8, 1971, and allowing three days for mailing under Fed. R. Civ. P. 6(e), the time would expire on February 17, 1971.

[8] 12 P. S. §31. In cases such as the instant appeal, where the federal statute on which a cause of action is based is silent as to a limitation period, courts have uniformly applied the statute of limitations of the forum state. *Auto Workers v. Hoosier Corp.*, 383 U.S. 696, 704 (1966); *Falsetti v. Local Union No. 2026, U.M.W.*, 355 F.2d 658, 661 (3d Cir. 1966).

instant action was not filed until November 4, 1968, and is thus barred by the six-year limitation period.

Plaintiffs argue that the rights of the affected workers are vested rights of a continuous nature and thus not barred by the statute of limitations. The analysis of the four-year protective period as creating a vested right to compensation which continues until such period terminates is rejected. It is clear from the face of the statute that the congressional mandate is to provide a four-year job protection period and not to create a vested right to compensation.[9] The protective order issued by the ICC as a condition of the merger imposed a duty on the Railroad to insure that employees would not be adversely affected by the merger and provided a scale of compensation for violations of that duty. There is no vested right to compensation as plaintiffs allege, but rather a right to protection from changes in employment status resulting from the merger.

The time of the accrual of the cause of action [10] is a federal question to be determined by reference to federal law.[11] The cause of action in the instant case ac-

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[9] "In its order of approval the commission shall include terms and conditions providing that during the period of four years from the effective date of such order such transaction will not result in employees of the carrier or carriers by railroad affected by such order being in a worse position with respect to their employment. . . ." 49 U.S.C. §5(2)(f).

[10] Plaintiffs contend that the right to sue does not commence until the obligation terminates, in this case October 31, 1965. Appellants' supplemental brief at 4.

[11] *Holmberg v. Armbrecht*, 327 U.S. 392 (1946); *Rawlings v. Ray*, 312 U.S. 96 (1941); *Vanderboom v. Sexton*, 422 F.2d 1233, 1240 (8th Cir.), *cert. denied*, 400 U.S. 852 (1970); Annot. 90 A.L.R. 2d 265 (1963).

crued on the alleged date that the duty was breached, which was the date of the furloughs.[12]

Count II

Plaintiffs in Count II are 22 former employees of Railroad who retired at the time of the consolidation. In October of 1961 the president of Railway notified his employees of the pending consolidation and offered to pay lump sum severance benefits to any man over the age of 65 who would voluntarily retire. The 22 plaintiffs in this Count signed retirement agreements and, later, releases. Both of these documents stated that the employees waived all rights under the ICC order of September 26, 1961. The district court, in granting defendants' motion for summary judgment, held that by signing these documents plaintiffs had waived any rights to compensation under the ICC order and that their claims were barred by the statute of limitations.

Plaintiffs' claim is barred by the applicable Pennsylvania six-year statute of limitations, 12 P. S. §31. The cause of action for compensation under the ICC order accrued upon severance in 1961 and this action was not filed until 1968. Plaintiffs assert that the statute of limitations should not have begun to run in 1961 because they had no knowledge of their rights under

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[12] *See Falsetti v. Local Union No. 2026, U.M.W.*, 355 F.2d 658 (3d Cir. 1966); *Gainey v. Brotherhood of Railway & Steamship Clerks, etc.*, 275 F. Supp. 292, 307 (E. D. Pa. 1967), *aff'd*, 406 F.2d 744 (3d Cir. 1968), *cert. denied*, 394 U.S. 998 (1969); *cf. Toussie v. United States*, 397 U.S. 112 (1970). It is noted that §12 of the Washington Job Protection Agreement provides: ". . . this agreement shall apply to such an employee *as of the date when he is so affected*" (emphasis supplied).

the ICC order. The releases and notices of retirement were entered in the record and are cognizable on a motion for summary judgment.[13] The record does not show the invalidity of these documents and does not establish a lack of knowledge by plaintiffs' class of rights under the ICC order. The validity of these documents as evidencing a knowing and intelligent waiver of rights is established by this record.[14] Therefore, plaintiffs' claim must fall on the additional ground of the existence of a valid waiver of the asserted rights.[15]

Count III

A collective bargaining agreement providing for compulsory retirement at age 65 was entered into in

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[13] Fed. R. Civ. P. 56(c).

[14] See Fed. R. Civ. P. 56(c); *Tripoli Co. v. Wella Corp.*, 425 F.2d 932, 935 (3d Cir. 1970). At oral argument, counsel for plaintiffs stated that he had filed no supporting affidavits on those issues and was relying on his pleadings.

[15] Plaintiffs were waiving an essentially contractual right and had the burden of proving the ineffectiveness of the waiver.

> "One who attacks a settlement must bear the burden of showing that the contract he has made is tainted with invalidity, either by fraud practiced upon him or by a mutual mistake upon which both parties acted." *Callen v. Pennsylvania R.R. Co.*, 332 U.S. 625, 630 (1948).

Plaintiffs were competent to make such a waiver. Their reliance on *Nemitz v. Norfolk and Western Ry. Co.* 436 F.2d 841 (6th Cir.), *aff'd.* as cited in footnote 25, *infra*, for the proposition that the protected individual cannot waive his rights to compensation under 49 U.S.C. §5(2)(f) is without merit. While *Nemitz* does hold that a union may not abrogate these rights, an individual is not powerless to waive his rights in return for a valid consideration. *Callen v. Pennsylvania R.R. Co., supra; cf. Johnson v. Zerbst*, 304 U.S. 458, 464 (1937).

January of 1962 by Railway and the three local unions which represented its employees.[16] Plaintiffs in Count III are the 30 employees who were forcibly retired pursuant to these agreements. Their complaint is that they were deprived of severance pay benefits[17] under the ICC protective order and they seek the convocation of a Special Board of Adjustment, as provided for in the 1966 amendments to §153 of the Railway Labor Act, 45 U.S.C. §153, to arbitrate this severance pay dispute. The claim for severance pay is based specifically on §7(a) of the Washington Job Protection Agreement, which provides for the payment of a "coordination allowance" to an employee who is "deprived of employment" as the result of a coordination.[18] In order for plaintiffs to prevail on this claim, it is necessary for them to prove that the compulsory retirement agreement was invalid or illegal.[19] In light of the prior deci-

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[16] The agreement was contained in three separate memoranda of agreement entered into by the parties. Exhibits III-A(1), (2), (3) to plaintiffs' amended complaint adding Count III.

[17] This controversy concerns claims for severance compensation only and not claims to pensions or other retirement benefits.

[18] The origin of plaintiffs' alleged right to severance pay is the above-mentioned ICC protective order which incorporated the Washington Job Protection Agreement. Plaintiffs' answer to defendants' interrogatory 9 indicates that the basis of their claims for relief was the Washington Job Protection Agreement.

[19] §7(d) of the Washington Job Protection Agreement provides that an employee is not regarded as being "deprived of employment" in case of his "retirement on pension or on account of age or disability in accordance with the current rules and practices applicable to employees generally." Plaintiffs were retired pursuant to the collective bargaining agreement which constituted the "current rules . . . applicable to

sions in *Roberts v. Lehigh & New England Railway Co.*, 211 F. Supp. 379 (E. D. Pa. 1962), *aff'd*, 323 F.2d 219 (3d Cir. 1963), and *Clemens v. Central Railroad Co. of New Jersey*, 399 F.2d 825 (3d Cir. 1968), *cert. denied*, 393 U.S. 1023 (1969), such an attack on the validity of the retirement agreement is barred by the principles of res judicata and the doctrine of the law of the case.[20]

Res judicata makes conclusive a final, valid judgment; and if the judgment is on the merits, precludes further litigation of the same cause of action by the parties or their privies.[21] In the *Roberts* case there was substantial identity of the parties with those in

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Note 19—*Continued*

employees generally." They were thus not "deprived of employment" and were excluded from the provisions of §7(a). In order to show that they were "deprived of employment," plaintiffs must show that their retirement was somehow invalid under §7(d). This would entail an attack on the validity of the retirement agreement.

[20] We have concluded that the defendants' motion for summary judgment should have been granted as to this Count. We do not reach the question of the standing to sue which was the ground for dismissal by the district court. In response to a question from the Bench at oral argument, counsel for plaintiffs asserted that they were abandoning all claims that the South Jersey Texas Employees Association was a proper party and were relying exclusively on their claim that the *Clemens* case should be overruled. They contend that they may attack the validity of the retirement agreements free from any claim of res judicata, irrespective of the Association's standing to sue.

[21] *Commisioner of Internal Revenue v. Sunnen*, 333 U.S. 591 (1947); *Freedman v. American Export Isbrandtsen Lines, Inc.*,—F.2d.—(3rd Cir., No. 19,359, Opinion filed 11/9/71); 1B Moore's Federal Practice ¶0.401; Restatement of the Law of Judgments, §§1, 41, 47, 83.

the instant action.[22] There is no question that the *Roberts* judgment was final and valid but plaintiffs assert that it was not rendered on the merits and does not involve the same cause of action.

This court in *Clemens* decided both of these issues adversely to plaintiffs. The court found that in both atcions (*Clemens* and *Roberts*) the same parties had complained of substantially the same wrong: their involuntary retirement without severance pay pursuant to the contract between the railroad and the Brotherhoods. In the *Clemens* case plaintiffs sought a mandatory injunction compelling arbitration and based their complaint on a violation of the ICC protective order issued pursuant to 49 U.S.C. §5(2)(f). In the *Roberts* case the relief sought was a declaratory judgment that the forced retirement was invalid and a violation of the Railway Labor Act, 45 U.S.C. §153, was alleged. *Clemens* held that to allow the differences between *Roberts* and *Clemens* to constitute a separate cause of action would "unduly shorten the reach of res judicata."[23] The court relied on its prior decision in *Williamson v. Columbia Gas & Electric Corp.*, 186 F.2d 464 (1950), for the proposition that "the fact that different statutes are relied on does not render the claims different 'causes of action' for purposes of res judicata." 186 F.2d at 468. We agree with the court's reasoning in *Clemens* and find it persuasive when applied to the facts of this appeal. Here the same wrong is once again alleged by the same parties but a new form of relief, the convocation of a Special Board of

[22] Although the named parties are different, both suits were class actions on behalf of all employees forcibly retired under the above-mentioned retirement agreement.

[23] 399 F.2d at 827.

Adjustment, is sought. This is clearly the same cause of action as that ruled on in the former *Roberts* decision.

Also, this court's decision in *Clemens* held that the decision in *Roberts* was rendered on the merits. The court in *Clemens* noted that the district court had refused to apply the doctrine of res judicata because of a finding that the decision in *Roberts* was based on a lack of jurisdiction under the Railway Labor Act and thus not a decision on the merits. In rejecting this position the court stated:

> "This approach overlooks the fact that in *Roberts* we passed on the merits of the issue of the legality of the 1962 contract, which was before us for substantive determination, before reaching the question whether any additional question about the 'interpretation' of the contract should be left to administrative determinnation." 399 F.2d at 827.

An examination of the *Roberts* opinion indicates that the court was careful to limit its ruling that it lacked jurisdiction only to questions involving the interpretation of the agreement and not to those involving its validity.[24] The court then went on to reject

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[24] "A federal district court has jurisdiction to determine the validity of a contract under the guarantees of the Act. On the other hand, if the resolution of the differences between railroad employees, on one side, and the railroad and the unions, on the other, depends on the interpretation of the disputed terms of the collective bargaining agreement, then the dispute must be sent to the National Railway Adjustment Board, which has exclusive primary jurisdiction to make the interpretation." 323 F.2d at 222.

each of plaintiff's asserted grounds for determining the agreements to be invalid and held that the agreements were valid.[25]

Accordingly, we conclude that plaintiffs are barred from asserting the invalidity of the retirement agreements by the doctrine of res judicata. Even if we were to accept plaintiffs' allegations that res judicata is not proper in this case, we would be bound under the doc-

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[25] Among the alleged grounds of invalidity rejected by the *Roberts* court was the argument that the retirement agreements circumvented the provisions of the Washington Job Protection Agreement and were thus invalid under the Railway Labor Act, 323 F.2d at 219. In *Clemens* the court held that the theory that the retirement agreements abrogated rights guaranteed by the ICC protective order and thus violated §5(2)(f) of the Interstate Commerce Act, 49 U.S.C. §5(2)(f), was barred by res judicata. The court reasoned that the claim under the ICC Act was basically the same cause of action as that asserted under the Railway Labor Act. *See* note 23, *supra*, and accompanying text. The Sixth Circuit Court of Appeals in *Nemitz v. Norfolk and Western Ry. Co.*, 436 F.2d 841, *aff'd.*—U.S.—, 40 L. W. 4007 (*#70-97, Opinion of* 11/15/71), stated that:

> "An agreement made pursuant to the last sentence of Sec. 5(2)(f) may vary the protection afforded by the ICC order, but it may not substantially abrogate employees' rights grounded in an ICC order." 436 F.2d at 848.

In the instant appeal, the questioned retirement agreements do not "substantially abrogate" the rights of the affected employees. The payment of lump sum retirement benefits to employees over the age of 65, rather than alternative payments such as severance pay and monthly retirement benefits, is not a "substantial abrogation" such as that which occurred in *Nemitz*. Irrespective of this we are bound by the decision in *Clemens* under the doctrine of the law of the case. *See* note 26 *infra*.

trine of the law of the case by the court's prior decision in *Clemens*. As stated by the late Judge Jones for this court,

> "The former decision of this court became the law of the case and, once the law of a case is settled by an appellate court, it is settled for that tribunal as well as for the trial court, save for new or different facts . . . . A second appeal may not be used to raise questions in the same case already put at rest by the same court on a prior appeal."[26]

For the reasons stated above, the December 30, 1970, district court order will be affirmed insofar as it granted summary judgment for defendants on Counts I and II (paragraphs 3 and 4), but will be amended to enter judgment for defendants on Count III (paragraph 5).

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[26] *United States v. Kreider Co.*, 117 F.2d 133, 135 (3d Cir. 1940), *rev'd on other grounds*, 313 U.S. 443 (1941). *See Trice v. Commercial Union Assurance Co.*, 397 F.2d 889 (6th Cir. 1968); *Hildreth v. Union News Co.*, 315 F.2d 548, 550 (6th Cir.), *cert. denied*, 375 U.S. 826 (1963); *General American Life Ins. Co. v. Anderson*, 156 F.2d 615, 619 (6th Cir. 1946); Annotation, 87 A.L.R. 2d 270 (1963); 1A Moore, Federal Practice, ¶0.404[2] (1961).

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 71-1257 and 71-1258

RENO ANTONIOLI and ALBERT GIST, individually
and on behalf of others adversely affected
and
THE SOUTH JERSEY TEXAS EMPLOYEES ASSOCIATION

v.

LEHIGH COAL AND NAVIGATION COMPANY
and LEHIGH & NEW ENGLAND RAILROAD,
LEHIGH & NEW ENGLAND RAILWAY,
THE CENTRAL RAILROAD COMPANY
OF NEW JERSEY

RENO ANTONIOLI and ALBERT GIST, individually
and on behalf of others adversely affected,
Appellants in No. 71-1257

THE SOUTH JERSEY TEXAS EMPLOYEES ASSOCIATION
Appellant in No. 71-1258

Present: VAN DUSEN, ALDISERT and GIBBONS
Circuit Judges

ORDER AMENDING OPINION

AND NOW, this 17th day of December, 1971, it is ORDERED that the following language be substituted for the last three sentences of footnote 25 at the bottom of page 11 of the slip opinion filed November 30, 1971, in the above matter:

In the instant appeal, we need not consider whether the questioned retirement agreements (see *Roberts*, 211 F. Supp. 383 and 323 F.2d 222-23) "substantially abrogate" the rights of the affected employees by preventing their receipt of severance pay contemplated by the Washington Job Protection Agreement, since we are bound by the decisions in *Roberts* and *Clemens* under the doctrines of res judicata and the law of the case. See note 26 infra.

FOR THE COURT,

FRANCIS L. VAN DUSEN
Circuit Judge

APPENDIX C

Judgment

This cause came on to be heard on the record from the United States District Court for the Eastern District of Pennsylvania and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the order of the said District Court, filed December 30, 1970, be, and the same is hereby affirmed insofar as it granted summary judgment for defendants on Counts I and II, and said order of the said District Court be, and the same is hereby amended to enter judgment for defendants on Count III, all in accordance with the opinion of this Court. Costs taxed against appellants.

November 30, 1971

APPENDIX D

1. The Interstate Commerce Act of February 4, 1887, as amended September 18, 1940, 54 Stat. 905, provides in part:

Sec. 5(2)(f) (54 Stat. 905)

> As a condition of its approval, under this paragraph, of any transaction involving a carrier or carriers by railroad subject to the provisions of this chapter, the Commission shall require a fair and equitable arrangement to protect the interests of the railroad employees affected. In its order of approval the Commission shall include terms and conditions providing that during the period of four years from the effective date of such order such transaction will not result in employees of the carrier or carriers by railroad affected by such order being in a worse position with respect to their employment, except that the protection afforded to any employee pursuant to this sentence shall not be required to continue for a longer period, following the effective date of such order, than the period during which such employee was in the employ of such carrier or carriers prior to the effective date of such order. Notwithstanding any other provisions of this chapter and chapters 8 and 12 of this title, an agreement pertaining to the protection of the interests of said employees may hereafter be entered into by any carrier or carriers by railroad and the duly authorized representative or representatives of its or their employees.

2. Title 12, Pennsylvania Statutes Annotated, Section 31, provides in part

§ 31. Personal actions, when to be brought

All actions of trespass quare clausum fregit, all actions of detinue, trover and replevin, for taking away goods and cattle, all actions upon account and upon the case (other than such accounts as concern the trade of merchandise between merchant and merchant, their factors or servants), all actions of debt grounded upon any lending, or contract without specialty, all actions of debt, for arrearages of rent, except the proprietaries' quit-rents, and all actions of trespass, of assault, menace, battery, wounding and imprisonment, or any of them, which shall be sued or brought at any time after the five and twentieth day of April, which shall be in the year of our Lord one thousand seven hundred and thirteen, shall be commenced and sued within the time and limitation hereafter expressed, and not after; that is to say, the said actions upon the case, other than for slander, and the said actions for account, and the said actions for trespass, debt, detinue and replevin, for goods or cattle, and the said actions of trespass quare clausum fregit within three years after the said five and twentieth day of April next, or within six years next after the cause of such actions or suit, and not after. And the said actions of trespass, of assault, menace, battery, wounding, imprisonment, or any of them, within one year next after the said five and twentieth day of April next, or within two years next after the cause of such actions or suit, and not after; and the said actions upon the case for words, within one year next after the words spoken, and not after. 1713, March 27, 1 Sm.L. 76, §1.

APPENDIX E

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

RENO ANTONIOLI, individually and on behalf of others adversely affected	:	CIVIL ACTION
and	:	
SOUTH JERSEY TEXAS EMPLOYEES ASSOCIATION	:	
v.	:	
LEHIGH COAL AND NAVIGATION COMPANY	:	
and	:	
LEHIGH AND NEW ENGLAND RAILROAD	:	
and	:	
LEHIGH AND NEW ENGLAND RAILWAY	:	
and	:	
THE CENTRAL RAILROAD COMPANY OF NEW JERSEY	:	No. 68-2444

Opinion and Order

FULLAM, J. December 30, 1970

This case is concerned with the rights of former employees of the Lehigh and New England Railroad (hereinafter Railroad) to allowances for displacements and dismissals arising out of the abandonment of most of the line of Railroad and the sale of the remaining 40 miles of track to the Lehigh and New England Railway (hereinafter Railway), a wholly owned subsidiary of the Central Railroad Company of New Jersey. This sale and abandoment occurred in

1961, and the Interstate Commerce Commission treated it as a consolidation pursuant to 49 U.S.C. §5(2) (Finance Docket 21155). In its order of September 26, 1961 (effective as of October 31, 1961), approving the consolidation, the ICC prescribed conditions pursuant to 49 U.S.C. §5(2)(f) for the protection of employees adversely affected. These conditions form the basis for plaintiffs' alleged claims.

The complaint contains three counts. Count I purports to be a class action on behalf of workers of Railroad who were furloughed allegedly as a result of a plan by the defendants to divert business from the lines of Railroad to other lines, including those subsequently sold to Railway, in order to give the appearance that Railroad was losing business as a result of general economic conditions rather than the consolidation. Count II is also a class action brought on behalf of 22 former employees of Railroad who were allegedly forced to retire at the time of the consolidation in ignorance of their rights under the ICC order. Both Counts I and II request a mandatory injunction requiring the parties to submit to arbitration and defining the composition of the arbitration panel. Count III is brought by the South Jersey Texas Employees Association on behalf of 30 former employees of Railroad (and after October 31, 1961, Railway) who retired pursuant to agreements entered into between Railway and three unions, the Brotherhood of Locomotive Firemen and Enginemen, the Order of Railway Conductors and Brakemen, and the Brotherhood of Railroad Trainmen, which represented the employees in 1962. Prior litigation has determined that these agreements are valid, and that the employees are relegated to proceedings before the National Railroad Adjustment Board to resolve disputes relating to their

interpretation. See *Roberts* v. *Lehigh and New England Railway*, 323 F.2d 219 (3rd Cir. 1963); *Clemens v. Central R.R. of New Jersey*, 399 F.2d 825 (3rd Cir. 1968) *cert. den.* 393 U.S. 1023 (1969). In 1966, the Railway Labor Act was amended to provide for special adjustment boards to hear the same matters as the National Railroad Adjustment Board. It is the convening of such a board that plaintiffs request in Count III. They allege that the employer and the unions (since consolidated into the United Transportation Union) have all refused to convene such a board.

The protective conditions imposed by the ICC which underlie this litigation are the conditions prescribed in the *New Orleans Union Passenger Terminal Case*, 282 ICC 271 (1952). That case, in turn, adopts the Washington Job Protection Agreement (hereinafter Washington Agreement) of 1936, an agreement worked out by railroads and employees' unions to prescribe standards for protection of employees affected by consolidation. The Washington Agreement is supplemented by certain conditions set forth in *Oklahoma Ry Co. Trustee Abandonment*, 257 ICC 177 (1944) (hereinafter *Oklahoma*). Both the Washington Agreement and the *Oklahoma* conditions provide a method for resolving disputes. Under the Washington Agreement (section 13), disputes are referred to a permanent committee set up by the parties to that agreement. Under *Oklahoma* they may be referred to an arbitration committee, to be set up by agreement of the carriers involved in the consolidation and the employees affected. Approximately 175 of the plaintiffs in Count I have presented their grievances to a Washington Agreement committee beginning in 1962, but have

received adverse rulings. They seek arbitration under the *Oklahoma* provisions.

Both parties have moved for summary judgment. Plaintiffs have moved for the determination of the class. Defendants contend that both Counts I and II are barred by the statute of limitations or laches.

Count I

Defendants' contention relating to limitations is based on the fact that many of the claims are for furloughs that occurred prior to 1961, and suit was not instituted until November 8, 1968. They argue that the general six-year statute provided for by Pennsylvania law (12 Pa. Stat. Ann. §31) should apply in the absence of a specific statute governing the federal cause of action. Plaintiffs contend that the claims did not actually arise until 1968 when counsel learned that defendants had entered into a contract in 1960 to divert traffic from the lines of Railroad, since plaintiffs never knew of this contract before, and it is the basis for the cause of action asserted in Count I.

The question of whether the suit is barred by a statute of limitations or laches is one for the Court, not an arbitration panel. *Amalgamated Clothing Workers of America* v. *Ironall Factories Co.*, 386 F.2d 586 (6th Cir. 1967). This issue is not one of those which would be subject to arbitration by the terms of the ICC order (whether an employee was furloughed as a result of the consolidation, the amount of his benefits). No reference to any limitations period is made in the ICC order or in 49 U.S.C. §5(2)(f). Therefore, the situation is different from that in *John Wiley & Sons, Inc.* v. *Livingston*, 376 U.S. 543 (1964) where the court held that issues pertaining to procedural steps provided for in a collective bargaining agreement neces-

sary to obtain arbitration of a claim should be passed upon by the arbitrators, not the court.

Certainly no cause of action could arise until September 26, 1961 when the consolidation was consummated and the ICC order entered. It is true as a matter of federal law that the statute does not run, nor is a party charged with delay, during a period in which the wrong is concealed by a defendant. *Holmberg, et al.* v. *Armbrecht, et al.*, 327 U.S. 392 (1946); *Moviecolor Ltd.* v. *Eastman Kodak Co.*, 288 F.2d 80 (2nd Cir.) *cert. den.* 368 U.S. 821 (1961). Similarly, the statute does not normally begin to run as long as the plaintiff remains in blameless ignorance of the injury done him, *Daniels* v. *Beryllium Corporation*, 227 F.Supp. 591 (E.D. Pa. 1964), or is otherwise prevented from bringing suit by something beyond his control. *Hall v. E. I. du Pont de Nemours & Co.*, 312 F.Supp. 358 (E.D.N.Y. 1970).

The record does not reveal anything, other than counsel's assertions, as to concealment or lack of knowledge until 1968. Even these assertions are rebutted by the record, which shows that as early as May 24, 1962, 157 former employees of Railroad, including the named plaintiff, Reno Antonioli, presented, through their unions, to a Washington Agreement section 13 committee, the same claim as is presented now (see plaintiffs' answers to interrogatories, document 58, exhibit A). That application states:

> "The designated employees were furloughed by the Lehigh and New England Railroad Co. prior to November 1, 1961, and it is our position that they were furloughed in anticipation of the coordination with the effect of depriving said employees of benefits to which they should be en-

titled as employees immediately affected by the coordination."

Though the contract "discovered" in 1968 might be slightly helpful to plaintiffs' claims, it does not change them. Mere ignorance of evidence on which to establish a claim is not sufficient to toll the running of the limitations period. *Moviecolor Ltd.* v. *Eastman Kodak Company, supra,* at 87. Besides, the contract was not a confidential document and was available in 1961 and 1962. Certainly the men knew that a consolidation had occurred and that they had lost their jobs. The ICC order was not a secret document. Therefore, at least by November 1962, six years before this suit was begun, the Count I plaintiffs knew or should have known that they had claims for displacement or dismissal allowances. It is from this time that the period of limitation began to run.

Defendants' contention with respect to the applicability of state statutes of limitation in federally-based causes of action is correct. *International Union, U.A.W.* v. *Hoosier Cardinal Corp.*, 383 U.S. 696 (1966); *Gainey* v. *Brotherhood of Railway and Steamship Clerks, Inc.*, 275 F. Supp. 292 (E.D. Pa. 1967). Even though this suit is of an equitable nature, requesting that the parties be ordered to arbitrate, and the doctrine of laches might be properly applicable, the statute of limitations is relevant in determining whether plaintiffs have inexcusably slept on their rights. *Gainey* v. *Brotherhood of Railway and Steamship Clerks, supra.*

The filing of the claim with the Washington Agreement committee in 1962 did not toll the running of the statute. Even though the claims were essentially

the same as those presently asserted, this suit would not have been barred by the pendency of those proceedings. Proceedings before administrative boards or other courts do not normally affect the computation of limitations periods. *McMahon* v. *United States*, 342 U.S. 25 (1951); *Falsetti* v. *Local Union No. 2026 United Mine Workers of America*, 355 F.2d 658 (3rd Cir. 1966); *Lipp* v. *United States*, 301 F.2d 674 (Ct.Cl. 1962), *cert. den.* 373 U.S. 932 (1963). Only where administrative proceedings are a necessary prerequisite to a court action do the proceedings toll the running of the statute. *Crown Coat Front Co., Inc.* v. *United States*, 386 U.S. 503 (1967); *Northern Metals Co.* v. *United States*, 350 F.2d 833 (3rd Cir. 1965). This is not the case here.

There is no genuine issue of material fact on the question of whether the plaintiffs are barred by time and, as a matter of law, whether the statute of limitations or the doctrine of laches is applied, Count I is barred. It would be inequitable to require defendants to defend against these claims, most of which involve facts even more than six years old, at this late date. It seems reasonably clear that this count was included because counsel came across some facts and a theory while engaged in related litigation which were new ideas to him but which had actually been pursued by many of these employees immediately after the consolidation.

Since the apparent theory of Count I is that men were furloughed without pay in anticipation of the consolidation (see paragraph 15 of the complaint), it would seem that men furloughed after the consolidation could not be members of the purported class of plaintiffs. Yet counsel has stated that the class con-

sists of all employees of Railroad on the payroll as of January 1959, and includes *any* employee who received less than the amount required under the ICC order. Whether there are any plaintiffs in this position whose claims are not barred is conjectural. Leave to amend the complaint to clarify the situation will be granted. The present motion to define the class will be denied.

Count II

With respect to this count plaintiffs, again, contend that they did not know of their right to benefits under the ICC order until 1968. However, plaintiffs have not disputed the fact that the 22 employees signed retirement agreements (see copy attached to defendants' brief) and, later, releases, (see affidavit of Lawrence J. Richette, exhibit N) both of which stated that the employees were waiving all rights under the ICC order of September 26, 1961. There is no contention that plaintiffs could not read. Still, counsel maintains that these documents were executed by the employees in ignorance of their rights. However, the record contains nothing other than the assertions of counsel to substantiate this contention.

Some suggestion is made that the time in which to consider the offer of the Railway was too short for the employees adequately to become acquainted with their rights. However, the ICC order was issued over a month before the initial retirement agreements were signed, and the letter from the president of Railway offering the retirement was issued 26 days before that date.

It is further argued that no employee would knowingly accept a lump-sum payment which amounted

to less than the total compensation available under the ICC order. However, such a decision would be quite rational. First, the payments under the ICC order are monthly and cease upon the death of the employee. The lump sum insures against an early death. Second, the payments under the ICC order are reduced by earnings from employment after discharge. Third, under the ICC order, the employee's rights to benefits would end in case of his retirement on account of age or disability, a strong possibility for the employees here involved as they were all at least age 65. Fourth, payments under the ICC order would cease if the employee were offered a job with the railroad which he was qualified to perform.

Furthermore, the Washington Job Protection Agreement itself provides that lump-sum severance payments may be taken by the employees, and the amounts provided are comparable to those actually offered the Count II employees in this case.[1]

On the present record, it has been established that plaintiffs knew of their rights when they signed the

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[1] Washington Job Protection Agreement section 9 provides the following schedule for lump-sum payments:

Length of Service	Separation Allowance
1 year and less than 2 years	3 months pay
2 years and less than 3 years	6 " "
3 years and less than 5 years	9 " "
5 years and less than 10 years	12 " "
10 years and less than 15 years	12 " "
15 years and over	12 " "

The agreements actually signed provide for 12 months pay for men age 66 to 68, 9 months pay for men 68 to 70, and 6 months pay for men 70 and over. (see affidavit of Lawrence J. Richette, exhibit D)

retirement agreements and releases, and summary judgment is justified on the ground that they have waived their rights to any payments under the ICC order. It is also clear that they knew or should have known of their rights at or about the time the agreements were signed, and the claims are time-barred.

At the time of argument, no member of the Count II class of plaintiffs was on the record as a named plaintiff. Since then counsel has moved to amend the complaint to add such a person. Though the complaint will be dismissed, this amendment will be allowed for the purposes of any possible future proceedings.

Count III

Plaintiffs seek a declaration that a Special Board of Adjustment may be empaneled pursuant to 45 U.S.C. §153 Second to hear their claims arising out of compulsory retirement agreements entered into in 1962 by the Lehigh and New England Railway and the collective bargaining representatives of the employees. Judge Joseph S. Lord, III previously dismissed this count because it was not brought by a "representative of any craft or class of employees" as required by the statute. He did rule that, aside from this defect, a Special Board of Adjustment, as an alternative to the National Railroad Board of Adjustment, was a proper body to hear the claims of the former employees comprising Count III. After dismissing the count, Judge Lord permitted plaintiffs to amend the complaint to add as plaintiff the South Jersey Texas Employees Association. This is a union which had until this time represented only employees of the Texaco Company.

Defendants contend that the Count II plaintiffs are not really members of this union, but I need not reach

that issue. It suffices to say that plaintiffs' counsel candidly admits that the former employees' membership is purely a formal one for the purposes of prosecuting this suit; the union has no interest in the suit, is contributing nothing to it, and all matters relating to its prosecution are controlled solely by counsel.

Neither the fact that Judge Lord permitted the amendment to add the union as a plaintiff nor the fact that he suggested in his opinion the possibility that a union might be found to prosecute the plaintiffs' claims, has any bearing on whether this union is a proper representative under 45 U.S.C. §153 Second. Plaintiff relies on *Brotherhood of Locomotive Engineers* v. *Denver & Rio Gande Western Railroad Co.*, 411 F.2d 1115 (10th Cir. 1969) where the court affirmed the holding of the District Court (290 F.Supp. 612 (D.Colo. 1968)) that a union which was not the authorized collective bargaining representative of the complaining employees could convene a Special Board of Adjustment and prosecute a grievance before it. However, in that case, the employees were engineers who sometimes performed the duties of firemen, and they used the firemen's union, rather than the engineers' union, to convene the Board. The result must be different where the union is totally unrelated to railroads and the employees.

The purpose of requiring a representative to convene a Special Board is to provide a screening of claims so that Special Boards will be limited in number and able to expedite the hearing of claims. A union unrelated to the industry and the employees cannot do this, and it is obvious that the South Jersey Texas Employees Association is not performing any such function. Moreover, one member of the Board is

to be designated by the representative of the employees. A union unrelated to the industry can hardly be expected to make an intelligent choice in this regard. Counsel argues that he is familiar with the industry and the claims involved, and since he is really conducting the litigation these problems are not really present. However, the statute does not provide that counsel may convene a Board. The proper interpretation of "representative" as used in 45 U.S.C. §153 Second is that it must be an organization which regularly represents employees in the railroad industry and which regularly represents employees who perform jobs similar or related to those performed by the employees it attempts to represent before a Special Board of Adjustment. Because the South Jersey Texas Employees Association is not such an organization, Count III must be dismissed.

Defendants contend that summary judgment should be granted in their favor with respect to Count III because it requests enforcement of the ICC order of September 26, 1961. Enforcement of an ICC order, they contend, is beyond the power of a National Board of Adjustment. The prior rulings in the *Roberts* and *Clemens* cases and the opinion of Judge Lord in this case indicate that the National Board of Adjustment is the proper body to construe the 1962 agreements. These rulings define the relief plaintiffs may obtain. The complaint does request that the issues be referred to a special board of adjustment to construe the agreements. It is possible that the protective conditions of the ICC order would be relevant to such a construction, but reference to that order does not subject the complaint to a summary judgment. Precisely what evidence a board would consider is a question for that body when claims are presented to it.

Defendants also contend that the prosecution of Count III should be stayed or that it should be dismissed because plaintiffs have not paid costs assessed against them in the *Roberts* and *Clemens* cases. Judge Higginbotham denied the same requests when made in the *Clemens* case. In view of the fact that Count III is being dismissed on other grounds, there is no need to rule on this matter. At any rate, the present record would not permit a ruling as there has been no showing as to the amount of unpaid costs or the ability of plaintiffs to pay.

ORDER

AND NOW, this 30th day of December, 1970, it is ORDERED that:

1. Plaintiff's motion to determine the class with respect to Counts I and II is DENIED.

2. Plaintiff's motion to amend the caption, as to Count II, to include as plaintiff Albert Gist, Nazareth, R. D. #2, Pennsylvania, is GRANTED.

3. Defendants' motion for summary judgment is GRANTED with respect to Count I. Insofar as it may relate to employees furloughed after the order of the Interstate Commerce Commission of September 26, 1961 permitting the consolidation of the Lehigh and New England Railroad and the Lehigh and New England Railway, judgment is entered without prejudice to the right to amend the complaint within thirty (30) days.

4. Defendants' motion for summary judgment with respect to Count II is GRANTED.

5. Count III is DISMISSED without prejudice for lack of standing to sue.